VIRGINIA LAW REGISTER

R. T. W. DUKE, JR., *Editor.*
HOMER RICHEY AND MINOR BRONAUGH, *Associate Editors.*

Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

The Present Sessions of the General Assembly.

The usual amount of bills, good, bad and indifferent, has been, up to the time we have gone to press, introduced in both houses of the General Assembly, and that body is now struggling to select the best out of the good. The lower house has passed the bill introduced by Mr. White, of Rockbridge, increasing venires in criminal cases to eighteen and allowing the Commonwealth two peremptory challenges. It is sincerely to be hoped that the Senate will adopt this bill, which can in no wise work the slightest injustiee to the prisoner, but which will save time and money and frequent mistrials to the Commonwealth. We have not heard one single argument of any force used against this change in the law. One legislator urged that because the Commonwealth had the concluding argument, therefore it should have nothing to say as to the formation of the jury—a decided *non sequitur,* we thought. Another urged that it was disturbing and changing an old, established custom. Granted; but this is a progressive age and if an old custom can be improved upon without doing any one harm, ought we not to try the change? Most people, when a proposition of this sort is made to them, seem to fail to recognize the fact that the prisoner today stands in a better position than he ever did before and that all the reforms have been to aid him, very often at the expense of justice. The selection of a fair, unprejudiced jury is as much due to the Commonwealth as to the prisoner and the sole object of this bill is to aid in that direction.

We note also with pleasure the fact that the bill allowing the proceeding by notice and motion in case of torts without respect to the character or nature of the defendant is likely to become a law. We regret to see, from the nature of several bills intro-

duced, that the General Assembly is in more cases than one being asked to make laws, especially in regard to the admission of evidence, which are evidently intended to fit particular cases. Such legislation is peculiarly dangerous and should be watched with the greatest caution. Its effect in unsettling law and precedent is hard to be overestimated and what may "work for righteousness" in one case, may "do the work of iniquity" in a thousand others.

Legislative Reference Bureau.

No measure of greater importance to the members of the General Assembly themselves, and hence to the public at large, has been proposed than that establishing a Legislative Reference Bureau—that is, a bureau which shall collect, collate and have on hand for quick and ready reference legislation on any given subject from the various states; so that our law-makers can see what has been done in other states and take heed thereof and have some guide out of the tangled maze of numerous laws; a bureau which shall have at its head a man trained in law-making and the ways of law-makers; who can counsel legislators as to the effect of their proposed measures; who shall advise whether certain measures are needed; who shall make known the good to be accomplished or the evil to be checked by any given measure; who shall assist in the drafting of bills so as to make them conform to constitutional requirements, good grammar, and written in crisp, clear verbiage.

The REGISTER has for some time been urging the necessity of a man or bureau to do this work. It should be taken entirely out of the realm of politics; the man should be selected with an eye single to his qualifications and good salaries should be paid him and his assistants, and every reasonable facility should be given to make this bureau efficient in every particular.

We came very near heading this article "Thomas W. Shelton;" for to his untiring efforts and expenditure of time and money will be due in great part any success which the reform in our legal proceeding may obtain. A bill is now before the General Assembly as follows:

Law Reform.

Be it enacted by the General Assembly of Virginia, that § 3112 of the Code of Virginia be amended and re-enacted so as to read as follows:

Section 3112. Court of Appeals shall prescribe forms of writs and regulate practice of courts.

The Supreme Court of Appeals shall, from time to time, prescribe the forms of writs and make general regulations for the practice of all the courts of record civil and criminal; and shall prepare a system of rules of practice and a system of pleadings, and the forms of process, to be used in all the courts of record of this State; and when the same are prepared and put into effect they shall have the force and effect of a statute, unless and until thereafter modified, and the court shall make report thereof to the General Assembly, in order that they may be published in the Acts of the current session, and they may be also otherwise published by authority of the court.

In the performance of the duties by this Act prescribed the Supreme Court of Appeals is hereby authorized to appoint a commission of three persons, learned in the law, to perform such service in connection therewith as the court may direct.

The sum of $1,500, or so much thereof as may be necessary, is hereby appropriated to be used in carrying into effect the purposes of this Act, to be paid out of any money in the Treasury available therefor upon the warrant of the President of the Supreme Court of Appeals.

All laws in conflict herewith are hereby repealed.

The General Assembly has elected this well-known jurist to the position of Associate Judge of our Supreme Court of Appeals to be vacated by Judge Buchanan next January. Judge Joseph L. Kelley prevailed over several competitors of high eminence either as lawyers or judges and is to be congratulated upon a clean, highly con-

Judge Kelley.

ducted campaign, and a well-won victory. Indeed every candidate for the position and the friends of each candidate deserve the thanks of our people for the manner in which this contest was carried on—one worthy of our best traditions and of the high office in view. Politics cut no figure—merit seemed the only argument used, and a standard was set to which we hope all other contests will measure.

Judge Kelley will bring to our Supreme Bench not only an intellect of the highest order, a character of stainless integrity, a mind well trained both at the bar and on the bench, but a personality which will extend the already wide circle of friends and admirers. He will succeed a jurist whose services to his Commonwealth have been marked by the zeal of untiring energy, by splendid loyalty and superb intellectuality in every position to which he has been called and whose labors both in the forum, in the halls of State and national legislatures and upon the bench, deserve and will receive the plaudits of his countrymen, mingled with the regret that failing health has compelled him to relinquish the position which he so much adorned. That his coming years may completely restore him to health and strength is the wish of every one who knows him.

The State and the United States in Regard to Fees of an Officer Acting for Both.

The case of Mulcrevy, etc. *v.* San Francisco, decided by the Supreme Court of the United States January 5, 1914, Advance Opinions, October Term 261, presents a rather curious complication, out of which a good deal of constitutional law might have been evolved had the court chosen to "wander afield." Mulcrevy was clerk of the city and county of San Francisco. His salary was four thousand dollars, which was to be in full compensation for all services rendered, and he was to pay all moneys coming into his hands, "no matter from what source derived," into the treasury of his city or county within twenty-four hours after the receipt of the same. *Ex virtute officii* he became clerk of the Superior Court which had jurisdiction of naturalization cases and as such under the federal

law was entitled to one-half of the fees derived from naturalization cases, the other half to go to the Bureau of Immigration and Naturalization. This one-half could not exceed three thousand dollars in any year, but in case over six thousand dollars per annum was gathered in, the clerk might be allowed by the Secretary of Commerce and Labor additional compensation for employment of additional clerical assistance, but for no other purpose. Mulcrevy collected five thousand, nine hundred and forty-four dollars and accounted for one-half, keeping the other, as he claimed, for extra work and clerical assistance, claiming he did not do this work in his official character but as agent designated by the Act of Congress to perform services in naturalization cases. It appears that the salary list of Mulcrevy's office amounted to the modest sum of fifty-eight thousand, six hundred dollars, which should have enabled him to supply a reasonable amount of help.

San Francisco ordered Mulcrevy to hand over his half of naturalization fees. He declined for reasons previously assigned, but was ordered to do so by an intermediate appellate court to whom the case under the California law had been assigned by the Supreme Court of that State, which Supreme Court denied Mulcrevy's petition to have the case heard in that court. The case is of some interest to Virginians, as it refers to the rule laid down in Norfolk & S. Turnpike Co. *v.* Virginia, 225 U. S. 264, upon which we commented editorially in a previous number of the REGISTER. The old question as to which court the writ of the Supreme Court of the United States should run, was again discussed and that Court seemed to doubt the correctness of the ruling of the Chief Justice—in which counsel on both sides concurred—that the writ should run to the highest court—i. e., the Supreme Court, which denied the petition. The court in view of the fact that the writ was issued prior to the decision in Norfolk *v.* Virginia, supra, took jurisdiction. There ought to be no doubt that the Chief Justice was right, as we pointed out in the editorial referred to. We quote the conclusion of the court's opinion to show what a contrariety of views has been had upon the question of the position of a clerk in such cases and how easily a conflict between the State and national governments

might have been evoked. A conflict which the Supreme Court very wisely held unnecessary and which as far as Mulcrevy is concerned ought never even to have been suggested.

"But it is contended by plaintiffs in error that the fees having been received officially is not of importance that nevertheless he acted as the representative of the United States, in execution of the policies of the United States, and being by the act of Congress invested with his powers, he is entitled for himself to the compensation prescribed by the act for their execution, without any liability to account for them to the city. The last proposition, however, does not follow from the others, and the others are but confusing. If it be granted that he was made an agent of the national government, his relations to the city were not thereby changed. He was still its officer, receiving fees because he was—not earning them otherwise or receiving them otherwise, but under compact with the city to pay them into the city treasury within twenty-four hours after their receipt.

"Under the contention of plaintiffs in error a rather curious situation is presented. Mulcrevy was elected to an office constituted by the municipality under the authority of the State. He was given a fixed salary of $4,000 with the express limitation that it should be his complete compensation. He agreed that all other moneys received by him officially should be paid into the treasury of the city. He was given office accommodations, clerks to assist him, and yet contends that notwithstanding such equipment and assistance, notwithstanding his compact, he may retain part of the revenues of his office as fees for his own personal use. We cannot yield to the contention. Nor do we think the act of Congress compels it. The act does not purport to deal with the relations of a state officer with the state. To so construe it might raise serious questions of power, and such questions are always to be avoided. We do not have to go to such lengths. The act is entirely satisfied without putting the officers of a state in antagonism to the laws of the state—the laws which give them their official status. It is easily construed and its purpose entirely accomplished by requiring an accounting of one half of the fees to the United States, leaving the other half to whatever disposition may be provided by the state law. Counsel cite some State decisions which have construed the act of Congress as giving a special agency to the clerks of the State courts, and as receiving their powers and rights from the national enactment. The reports of the Department of Commerce and Labor are

quoted from, which, it is contended, exhibit by their statistics and recommendations the necessity of national control. State decisions expressing a contrary view are frankly cited. This contrariety of opinion we need not further exhibit by a review of the cases. We have expressed our construction of the act, and it is entirely consonant with the purpose of the act and national control over naturalization."

The Law and the Liquor.

Now that the Enabling Act has passed the Legislature and the rights of the guileless farmer have been protected in allowing him to sell cider containing six per cent of alcohol, which, we believe, though we do not speak from experience, is sufficient if taken in reasonable quantities, to produce a glorious jag, the opinion of our Supreme Court of Appeals in Gayle & Eason *v.* Commonwealth, decided January 15, 1914, becomes of a good deal of importance. No one who reads this opinion can hesitate for one moment in thinking that the court construed the law as it should be construed. This case arose under § 24 of the Bird Liquor Law, which forbids the sale of cider containing more than six per cent of alcohol in local option or no license territory. The plaintiff sold a cider forbidden by the act and the fact that it contained more than six per cent of alcohol was sought to be shown by the analysis of C. M. Bradbury, "Assistant State Chemist," verified by his affidavit. Section 24 is as follows:

"It shall be the duty of the State commissioner of agriculture, at the written request of any officer, State, county or municipality, charged with the execution of the revenue laws, to cause to be analyzed any mixture supposed to contain alcohol and to return to the officer making the request a certificate of the chemist showing such analysis. The certificates of the chemist of the agricultural department of this State, when signed and sworn to by him, shall be evidence in all prosecutions under the revenue laws of this State and in all controversies touching the mixture analyzed by him, but the burden shall be upon the prosecution to establish the fact that the mixture analyzed is the same as that alleged to have been illicitly sold, but upon the motion of the accused the chemist shall be required to appear as witness and shall be subjected to cross-examination."

In the case at bar there was no written request to the Com-

missioner of Agriculture and no return by him of the certificate of the State chemist showing the analysis, and no return made to him by the state chemist. The court held that no one but the State chemist could make this analysis and that the letter of the law had to be followed with extreme strictness, the court saying that "The statute is in a high degree penal and the evidence upon which a conviction under it may be had is an invasion of the general law and must be strictly construed." The counsel for the defendants, who were convicted in the lower court, urged that the act was unconstitutional under that part of Article 1, § 8, of the Bill of Rights which declares that "in all criminal prosecutions a man hath a right * * * to be confronted with the accuser and witnesses * * *" and that therefore the admission of the chemist's certificate as evidence would be in violation of the constitutional rights of the defendant. The court declined to pass upon this question.

The decision in this case, however, adhering technically to the strict rules of law and therefore in our humble judgment in every way to be commended, is in strange contrast with many of the decisions in which the sale of liquor is concerned. There seems to be something about the liquor question which intoxicates not only the users but the non-users, and more bad temper, unchristian conduct and strange decisions of the courts seem to characterize this question than any other ever discussed. We had supposed, for instance, that under a strict construction of the criminal law a man when accused of an offense had a right to have the particular offense of which he was accused charged with certainty, so that he could know with reasonable certainty the time and place of his offense and thus be able to meet the charge. But the court of appeals of West Virginia has held in State *v.* Boggess, 36 W. Va. 713, that no particular place need be alleged in case of the sale of spirituous liquors to a minor. Our own court of appeals in the case of Commonwealth *v.* Hampton, 3 Gratt. 590, held that the indictment upon the statute must state all the circumstances which constitute the definition of the offense in the act, so as to bring the defendant precisely within it. And yet in Rund's Case, 108 Va. 872, which is supported by several anterior cases from our own court it is held that neither the

time nor the person to whom the sale was made need be alleged in the indictment, though in various other cases it has been held that the indictment must allege that the sale was committed within twelve months. In O'Donnell's Case, 108 Va. 882, it was held that a sale by a clerk, if proven that he was acting in the conduct of the business with which he was charged by the principal, was sufficient to convict the principal, and in that case "intention" was held not to be a necessary element in the offense of liquor selling.

In the case of Davine *v.* Commonwealth, 107 Va. 860, it was held that an indictment might be found against a man accused of selling liquor illegally to several persons, without naming any of them or any time at which the sale was made, so that it was in the statutory period and that on the trial of the case the Commonwealth could elect any one case it chose under that indictment and prosecute for it. This case simply re-affirmed the decision in Hatcher *v.* Commonwealth, 106 Va. 827, though it is to be hoped that it may be construed as somewhat limiting the broad assertion in the last named case that the Commonwealth may introduce all of its evidence as to various sales at various times and then elect which case it will try, if it does so prior to the introduction of any evidence by the defendant.

Nor we would like to know what the old time criminal lawyers would have thought of these decisions in a criminal case, and while it is true, as the court says in Hatcher's case, there has been a relaxation of the strict rules as to pleading and introduction of evidence in cases of this character because of the difficulty the Commonwealth has in prosecuting offenses of this kind, or for some other reason, certainly these decisions seem to be an "invasion of the general law" in criminal cases.

Nor can we offer much consolation to the counsel who claim that the introduction of the certificate of the State chemist as evidence is unconstitutional, in view of Clopton *v.* Common wealth, 109 Va. 813, in which the possession of a United States Revenue license to sell liquor by one not licensed to sell under the State law, is made prima facie evidence of a sale of liquor contrary to State law, is held to be a valid and constitutional enactment. The statute making such a license prima facie evidence is also approved in Williams' Case, 111 Va. 870.

But the decisions of our own court are mild when compared with those of some of the western states in which every known principle of the common law is whistled down the wind the moment any one is accused of the unlawful sale of intoxicating liquor. It may be that these decisions are wise—rendered necessary by the peculiar circumstances of the case—but surely they are departures from what we were taught few decades back to be the general law.

The Report of the Attorney General.

Most lawyers are aware of the Attorney General as a lawyer elected to take charge of the State's legal business in a general sort of way, and whose name is known to many of us on the pages of the Reports as representing the Commonwealth in criminal appeals. Few are aware that from 1775 to 1914 only twenty men have occupied the position and one of these—a military appointee—only holding for one year. Edmund Randolph and James Innes each held the office for ten years, Philip N. Nicholas for twenty, John Robertson for fifteen, and Sidney S. Baxter for eighteen years.

The report of Hon. Samuel W. Williams, whose term of office expired with last year, shows that the duties of the office have been very extensive and in the matter of the litigation between the States of Virginia and West Virginia involving exceedingly nice questions and large amounts of money. Of the twenty-three cases in our Supreme Court of Appeals eight were reversed, error confessed in four, and in one the prisoner had given "leg bail" and the case was dismissed

Probably the most remarkable thing alluded to in this report, and one which we trust will never occur again in the history of this State, is the attempt on the part of various persons to have the Lieutenant-Governor of the State assume the powers of the Governor during his temporary absence from the State, for the purpose of pardoning or commuting the sentence of the two Allens, who committed the most terrible murders that ever stained the history of this Commonwealth. The report of the Attorney General and his opinion in this matter furnishing very interesting

reading, and no one who reads the opinion can have the slightest doubt as to its correctness. The Lieutenant Governor—as was well said in the opinion—can never exercise the powers and functions of Governor until he acts as "Governor" and not as "Lieutenant Governor," and the "temporary removal" of the Governor —as, for instance, crossing the Potomac River to attend the inauguration of a president—was not the removal contemplated by the Constitution. How any one could ever have thought otherwise it is hard for us to conceive. To have one Governor in the District of Columbia and one in Richmond at the same time would be rather a strange state of affairs, and that the Governor should lose his one day's "compensation" and the Lieutenant Governor receive it during that time would render that section of the Constitution a farce.

We congratulate the outgoing Attorney General upon the services he has rendered the Commonwealth; and for the Hon. Jas. Garland Pollard, the able and distinguished lawyer who succeeds him, we extend our most cordial wishes for the success which his past career so clearly indicates.

Service of Process on Corporations.

The opinion in House *v.* Universal Lumber Company, to which we alluded in our editorial in the January number of the REGISTER, has been revised and that portion which referred to the service of process upon an agent of a corporation has been stricken from the opinion, it not being necessary to the decision of the case. It is therefore no longer authority upon the question discussed and our editorial is rendered useless.